No. 84-62

In the Supreme Court of the United States

OCTOBER TERM, 1984

ATLAS MACHINE & IRON WORKS, INC., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Tennessee Valley Authority did not waive its right to terminate its contract with petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 734 F.2d 12 (Table). The liability opinion of the district court (Pet. App. 10a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on June 1, 1984 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on July 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Tennessee Valley Authority (TVA) is a wholly owned government corporation (16 U.S.C. 831 *et seq.*), with statutory authority, inter alia, to construct and operate facilities to generate and transmit electricity, and to sell electric power in a seven-state area of the southeast in

furtherance of its resource development functions (16 U.S.C. 831i, 831n-4). The costs of these electric power functions are not born by taxpayers; instead, they are paid for by TVA's electric ratepayers and by the issuance of power system revenue bonds, which Congress has declared "shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States" (16 U.S.C. 831n-4(b)).[1] TVA is also exempt from the statutes that generally regulate procurements by other federal agencies; the TVA Act, in Section 9(b), 16 U.S.C. 831h(b), contains its own procurement provisions. See *Oman Construction Co.* v. *TVA*, 486 F. Supp. 375, 381 (M.D. Tenn. 1979).

2. In 1978, TVA awarded petitioner Atlas Machine & Iron Works, Inc. two contracts requiring petitioner to fabricate and deliver to TVA a number of large welded steel "embedments" for six nuclear generating units that TVA was constructing in Tennessee (Pet. App. 2a). One contract called for the fabrication of six "steam tunnel" embedments to be delivered between March 1, 1979 and September 1, 1980. The second contract called for the fabrication and delivery over a three-year period of 78 "drywell frame" embedments, with separate delivery dates for each of the 78 frames. Deliveries were to begin on April 17, 1979 and end on March 17, 1981 (*ibid.*).

Contractual problems began almost immediately. Petitioner repeatedly failed to meet the schedules for delivery of parts and its workmanship was extremely poor (Pet. App. 3a). Efforts to resolve these problems led to assurances by petitioner that the quality and timeliness of its work would improve; but by June 1980, construction ceased on several

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[1]See generally, *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 6-7 (1968). TVA power system financing is discussed in detail in *Mobil Oil Corp.* v. *TVA*, 387 F. Supp. 498, 504-506 (N.D. Ala. 1974).

items, and by December 1980, petitioner in effect abandoned the two contracts. Accordingly, in February 1981, TVA terminated petitioner's right to proceed under the contracts. In 1982, TVA decided to defer construction of its nuclear plants (*ibid.*).

3. TVA filed suit against petitioner in the United States District Court for the Eastern District of Virginia, seeking to recover all materials related to the contracts. Both parties then filed claims for damages, alleging breach of contract (Pet. App. 3a, 11a). The district court found that TVA properly terminated petitioner's rights under the contracts because of petitioner's "lack of due diligence — sub-par workmanship — improper implementation of its [quality assurances] program — late deliveries — together with the progressive worsening of these deficiences by February of 1981" (Pet. App. 15a).

The court also held that TVA had not waived its termination rights by not acting when petitioner initially breached by not delivering items on time. The court noted that both parties benefited by the effort to resolve petitioner's problem; petitioner repeatedly promised to improve its performance; TVA continuously advised petitioner that it would be liable for costs incurred due to poor performance; and TVA's contract provided that allowing a contractor additional time within which to perform would not constitute a waiver of any remedy otherwise available (Pet. App. 15a-16a).[2]

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[2]The contracts specifically provided for progress payments to petitioner for each embedment, upon its certification that work on the embedment had reached a completion stage of 25, 50, 75, and 100%. *TVA* v. *Atlas Machine & Iron Works, Inc.*, No. 81-194 (E.D. Va. Apr. 14, 1983), slip op. 13. (A copy of the district court's opinion on damages in this case is being lodged with the Clerk of the Court.) Petitioner was thus compensated in accordance with its agreement for work completed through the date of termination, and the district court also awarded petitioner the amount of unbilled work in progress at termination.

The court of appeals affirmed (Pet. App. 1a-7a). The court rejected petitioner's assertion that "TVA should have terminated sooner, if it was going to terminate at all" (*id.* at 5a). The court reasoned that basic contract principles are not so inflexible that they required TVA to terminate immediately in light of the complexity of the contractual relationship and the mutual benefit that TVA's delay was intended to provide. Accordingly, the court of appeals concluded that "TVA's reasonable efforts to salvage the situation cannot be viewed as a waiver of its right to claim default" (*ibid.*).

ARGUMENT

Petitioner argues (Pet. 4-19) that the decisions below conflict with decisions of the former Court of Claims (now Federal Circuit) that have refused to allow a default termination "after a two-year delay and long contractual performance, unless the injured party had expressly reserved its right to terminate at the time of the initial breach" (Pet. 5). What petitioner ignores is that its "default" in this case was not based solely on the *original* failure to perform in timely fashion. Rather, as the district court found, petitioner continued to perform inadequately in staffing, welding, and quality assurance (as well as missing later delivery dates) throughout the period after the initial breach and in December 1980 petitioner in effect abandoned the contract. Thus, even if the government waived its right to terminate because of the original default, it certainly did not waive its right to terminate in response to petitioner's future unforeseen breaches.

Nor do any of the cases relied upon by petitioner (Pet. 4 n.4) hold that an election to proceed in the face of an initial default waives the injured party's right to terminate in the face of repeated future breaches of contract. To the contrary, in those cases the Court of Claims expressly recognized that a contractor's performance after "a waiver after

breach" could serve as an independent basis for terminating the contract. See *IT&T Corp.* v. *United States,* 509 F.2d 541, 547 (Ct. Cl. 1975); *DeVito* v. *United States,* 413 F.2d 1147, 1154 (Ct. Cl. 1969). See also *Cities Service Helex, Inc.* v. *United States,* 543 F.2d 1306, 1317 (Ct. Cl. 1976).[3] The court of appeals was clearly correct in holding that petitioner's repeated failures to perform and eventual abandonment of the contract after TVA attempted to salvage the contract permitted TVA to terminate in February 1981. This holding, which is essentially limited to the facts of this case, does not warrant review by this Court.

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[3]Petitioner's contention that refusal to terminate a contract waives all past and future breaches of contract would obviously require TVA to terminate at the earliest possible time in all cases of material breach. While such a rule is perhaps reasonable if the sole basis for termination is the initial breach, it makes no sense if the contractor subsequently refuses to perform. Such a rule would impair TVA's ability to work with its contractors in the future to help solve their problems. See *Cities Service Helex, Inc.* v. *United States,* 543 F.2d at 1314; 5A A. Corbin, *Corbin on Contracts* § 1220 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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